IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 10, 2009 Session

NANCY L. LANE v. JODI D. McCARTNEY, M.D., ET AL.

Appeal from the Law Court for Washington County
No. 24643 Thomas J. Seeley, Jr., Judge

No. E2008-02640-COA-R3-CV - FILED JULY 30, 2009

Nancy L. Lane ("Plaintiff") sued Karen K. Lauer-Silva, M.D. and Medical Education Assistance Corporation d/b/a ETSU Physicians & Associates ("Defendants")[1] alleging medical malpractice. Defendants filed a motion for summary judgment. After a hearing on Defendants' motion, the Trial Court entered an order finding and holding, *inter alia*, that Plaintiff's expert witness did not meet the requirements of Tenn. Code Ann. § 29-26-115, and granting Defendants summary judgment. Plaintiff filed a motion to alter or amend along with a Second Supplemental Affidavit from Plaintiff's expert. The Trial Court considered the Second Supplemental Affidavit and found that Plaintiff's expert still did not satisfy the requirements of Tenn. Code Ann. § 29-26-115, and again granted Defendants summary judgment. Plaintiff appeals to this Court. We reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Law Court Reversed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. McCLARTY, J., joined.

Rob Starnes, Kingsport, Tennessee for the Appellant, Nancy L. Lane.

Charles T. Herndon, IV, and Elizabeth M. Hutton, Johnson City, Tennessee for the Appellees, Karen K. Lauer-Silva, M.D. and Medical Education Assistance Corporation d/b/a ETSU Physicians & Associates.

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[1] Plaintiff also sued Jodi D. McCartney, M.D. Dr. McCartney filed a motion for summary judgment. After a hearing, the Trial Court entered an order finding and holding that Dr. McCartney had absolute immunity and dismissing with prejudice the case against Dr. McCartney. Dr. McCartney is not involved in this appeal.

OPINION

Background

Plaintiff sued Defendants in connection with a surgery performed on Plaintiff that involved a total abdominal hysterectomy with bilateral salpingo-oophorectomy, a Burch retropubic urethropexy, and a uterosacral colpopexy. Defendants answered the complaint and then filed a motion for summary judgment supported by the affidavit of Dr. Lauer-Silva opining that she did not deviate or depart from the acceptable standard of care in her care and treatment of Plaintiff.

Plaintiff opposed the motion for summary judgment and filed the expert affidavit of Leonard W. Aamodt, M.D. opining that Defendants fell below the acceptable standard of care in their care and treatment of Plaintiff. Dr. Aamodt's affidavit stated that Dr. Aamodt is Board Certified in Obstetrics and Gynecology; is licensed to practice and actively engaged in the practice of obstetrics and gynecology in Virginia; and is "familiar with the standard of care in Tennessee." During his deposition taken after the filing of his affidavit, Dr. Aamodt, when asked, admitted that he never has practiced in Tennessee, never has had any medical training in Tennessee, never has been to Johnson City, and although he had reviewed statistical information about Johnson City, he was unable to recall the details.

Plaintiff later filed a Supplemental Affidavit of Dr. Aamodt stating, in pertinent part:

> I am intimately familiar with the standard of care for Obstetrics and Gynecology for Harrisonburg, Virginia where I am actively engaged in said practice and have been for many years. I have reviewed and compared the U.S. Census Bureau population statistics and demographic profile highlights for Johnson City, Tennessee and Harrisonburg, Virginia. Both Harrisonburg, Virginia and Johnson City, Tennessee are small, but growing urban metropolitan areas located in larger rural areas in the Appalachian mountain chain. Geographically they are similar. The population and social characteristics for Johnson City, Tennessee and Harrisonburg, Virginia are most similar and are identical in many categories. For instance, both Harrisonburg and Johnson City, Tennessee fall below the national average for high school graduates and both Johnson City, Tennessee and Harrisonburg, Virginia are slightly above the national average for college graduates with a Bachelor's degree or higher. The size of the hospitals in both communities is similar. Additionally, I have reviewed other Obstetrics and Gynecology cases from East Tennessee. I have consulted with physicians from other states including Tennessee at various times in the past. Based on the above, I am able to say that I am familiar with the standard of care in Johnson City, Tennessee or a similarly situated community Harrisonburg, Virginia.

The Trial Court heard argument on Defendants' motion for summary judgment and then entered an order granting Defendants summary judgment and specifically finding and holding:

"that the Affidavit and materials submitted in opposition to the motion for summary judgment are not sufficient, and do not raise a genuine issue of material fact, and that the expert witness for the Plaintiff does not meet the requirements of T.C.A. 29-26-115."

Plaintiff then filed a Second Supplemental Affidavit of Dr. Aamodt and a Motion to Rehear claiming "that Dr. Aamodt was rehabilitated as to his knowledge of the standard of care in Johnson City, Tennessee." In his Second Supplemental Affidavit, Dr. Aamodt stated, in pertinent part:

> 3. I am intimately familiar with the standard of care for Obstetrics and Gynecology for Harrisonburg, Virginia where I am actively engaged in said practice and have been since 1994. I have reviewed and compared the U.S. Census Bureau population statistics and demographic profile highlights for Johnson City, Tennessee and Harrisonburg, Virginia. The last U.S. Census lists the population of Harrisonburg, Virginia as 40,468 and Johnson City, Tennessee 55,469. Both Harrisonburg, Virginia and Johnson City, Tennessee are small, but growing urban metropolitan areas located in larger rural areas in the Appalachian mountain chain. Geographically they are similar. The population and social characteristics for Johnson City, Tennessee and Harrisonburg, Virginia are most similar and are identical in many categories. For instance, both Harrisonburg and Johnson City, Tennessee fall below the national average for high school graduates and both Johnson City, Tennessee and Harrisonburg, Virginia are slightly above the national average for college graduates with a Bachelor's degree or higher. The size of the hospitals in both communities is similar. Additionally, I have reviewed other Obstetrics and Gynecology cases from East Tennessee. I have consulted with physicians from other states including Tennessee from time to time regarding specific patients. I have a close personal friend and colleague who practices Gynecology in Chattanooga, Tennessee. I have visited him in Chattanooga, Tennessee on several occasions and we have discussed the practice of Obstetrics and Gynecology in our respective communities. Based on the above, I am able to say that I am familiar with the standard of care in Johnson City, Tennessee or a similarly situated community comparable to Harrisonburg, Virginia.
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> 4. Prior to my deposition I consulted with the above mentioned Gynecologist who lives in Chattanooga, Tennessee regarding the standard of care as applied to the specific circumstances of this case. After this discussion, it is my opinion that the standard of care regarding the circumstances of this case is the same in Chattanooga, Tennessee as in Harrisonburg, Virginia. In my deposition I was asked if I had consulted with treating physicians, but was not asked if I had consulted with colleagues.
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> 5. Both hospitals are mid-size community hospitals. Johnson City Medical Center has 443 beds and Rockingham Memorial Hospital in Harrisonburg, Virginia has 270 beds. Both hospitals have helicopter service. Rockingham Memorial Hospital offers the same range of specialities and subspecialities regarding women's health as listed

> on Johnson City Medical Center's website. Gynecologic surgery, which is what is at issue here, is offered at both hospitals. Rockingham Memorial Hospital offers a Family Birth Center similar to that described on the Johnson City Medical Center's web site.
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> 6. My residency training and Dr. Lauer-Silva's residency training were governed by the same set of standards as set forth by the Council on Resident Education on Obstetrics and Gynecology, a part of the American College of Obstetrics and Gynecology (ACOG). This body sets standards which are applicable in both communities. The American Board of Obstetrics and Gynecology (ABOG) is also authoritative on the standard of care in Gynecology and cannot be ignored.
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> 7. I have reviewed Dr. Lauer-Silva's deposition p. 58, ll. 17-25 and her testimony that the standard of care in Fremont, Nebraska is not different than Johnson City, Tennessee for evaluating the ureters supports what I have said above.

The Trial Court held a hearing on Plaintiff's motion to rehear and then entered an order finding and holding, *inter alia*:

> The Court specifically finds that the affidavit of Dr. Aamodt is not sufficient to rebut the Defendant's motion for summary judgment and that Dr. Aamodt is not qualified by virtue of the provisions of T.C.A. 29-26-115. In addition thereto, the Court finds that on the motion to reconsider, should the Plaintiff find and produce an appropriate qualified expert affidavit other than Dr. Aamodt, within 60 days of the date of the August 25th hearing, then the Court will grant the motion to reconsider. Failing the filing of such a qualified affidavit, the Summary Judgment in this cause shall be final.

Plaintiff did not file another expert witness affidavit, and by order entered October 27, 2008, the Trial Court dismissed the case with prejudice. Plaintiff appeals to this Court.

Discussion

Although not stated exactly as such, Plaintiff raises two issues on appeal: 1) whether the Trial Court erred in finding that Plaintiff's expert witness was not familiar with the standard of care in a "similar" community pursuant to Tenn. Code Ann. § 29-26-115, and, as a result, then granting summary judgment to Defendants; and, 2) whether the Trial Court erred in refusing to grant Plaintiff's motion to alter or amend.

Our Supreme Court has described the process for reviewing a trial court's grant of summary judgment as follows:

> The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. *See Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *See Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that its motion satisfies these requirements. *See Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn. 1991). When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *See Byrd v. Hall*, 847 S.W.2d at 215.

Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 88 (Tenn. 2000).

As pertinent to this appeal, Tenn. Code Ann. § 29-26-115 provides:

> **29-26-115. Claimant's burden in malpractice action – Expert testimony – Presumption of negligence – Jury instruction. –** (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided in subsection (b):
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> (1) The recognized standard of acceptable professional practice in the profession and the speciality thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.
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> (b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or speciality which would make the person's expert testimony relevant to the issues in the case and had practiced this

> profession or speciality in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection (b) when it determines that the appropriate witnesses otherwise would not be available.…

Tenn. Code Ann. § 29-26-115 (Supp. 2008). As our Supreme Court has explained:

> This statute embraces the so-called "locality rule," which requires that the standard of professional care in a medical malpractice action be based upon "the community in which the defendant practices or in a similar community." As this Court recently explained:
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> > A medical expert relied upon by a plaintiff must have knowledge of the standard of professional care in the defendant's applicable community or knowledge of the standard of professional care in a community *that is shown to be similar* to the defendant's community.

Stovall v. Clarke, 113 S.W.3d 715, 722 (Tenn. 2003) (quoting *Robinson v. LeCorps*, 83 S.W.3d 718, 724 (Tenn. 2002)) (emphasis in original).

In *Taylor v. Jackson-Madison County Gen. Hosp. Dist.*, a medical malpractice case also dealing with an issue regarding the competency of an expert witness to testify, this Court explained:

> Trial courts in Tennessee are vested with broad discretion in determining the admissibility, qualifications, and competency of expert testimony. *Roberts v. Bicknell*, 73 S.W.3d 106, 113 (Tenn. Ct. App. 2001) (citing *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263 (Tenn. 1997)). However, "[a]lthough the trial court has broad discretion in determining the qualifications of expert witnesses and the admissibility of their testimony … [,] reversal of the trial court's discretion is appropriate where the trial court's action is clearly erroneous or where there has been an abuse of discretion." *Wilson v. Patterson*, 73 S.W.3d 95, 102 (Tenn. Ct. App. 2001) (citations omitted).
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> Proof regarding the "failure of a physician to adhere to an acceptable standard of care in treating a patient must be by expert medical testimony." *Williams v. Baptist Mem'l Hosp.*, 193 S.W.3d 545, 553 (Tenn. 2006); *Roberts*, 73 S.W.3d at 113. "In order to qualify as an expert in a medical malpractice action, a physician is not required to be familiar with all the medical statistics of a particular community." *Wilson*, 73 S.W.3d at 102. [sic] (citing *Ledford v. Moskowitz*, 742 S.W.2d 645 (Tenn. Ct. App. 1987)). However, in order to satisfy the requirements set forth under Section 29-26-115(a),

> a medical expert relied upon by the plaintiff "must have knowledge of the standard of professional care in the defendant's applicable community or knowledge of the standard of professional care in a community *that is shown to be similar* to the defendant's community." *Robinson v. LeCorps*, 83 S.W.3d 718, 724 (Tenn. 2002). Expert witnesses may not simply assert their familiarity with the standard of professional care in the defendant's community without indicating the basis for their familiarity. *Id.*; *see also Stovall v. Clarke*, 113 S.W.3d 715, 723 (Tenn. 2003); [*Kenyon v. Handal*, 122 S.W.3d 743, 760, 762 (Tenn. Ct. App. 2003)].

> *Williams*, 193 S.W.3d at 553. "[W]hile an expert's discussion of a national standard of care does not require exclusion of the testimony, 'such evidence may not substitute for evidence that first establishes the requirements of [Section] 29-26-115(a)(1).'" *Stovall*, 113 S.W.3d at 722 (quoting *Robinson*, 83 S.W.3d at 724). Thus, if a plaintiff's expert fails to demonstrate adequate knowledge concerning the medical resources and standards of care of the community in which the defendant practices, or a similar community, then such plaintiff will be unable to demonstrate a breach of duty. *Mabon v. Jackson-Madison County Gen. Hosp.*, 968 S.W.2d 826, 831 (Tenn. Ct. App. 1997) (citing *Cardwell v. Bechtol*, 724 S.W.2d 739, 754 (Tenn. 1987)).

Taylor v. Jackson-Madison County Gen. Hosp. Dist., 231 S.W.3d 361, 365-66 (Tenn. Ct. App. 2006) (emphasis in original). "When our review arises from a trial court's award of summary judgment, however, we must view statements made in the expert's affidavit in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." *Eckler v. Allen*, 231 S.W.3d 379, 384 (Tenn. Ct. App. 2006).

We begin by considering whether the Trial Court erred initially in finding that Plaintiff's expert witness was not familiar with the standard of care in a similar community pursuant to Tenn. Code Ann. § 29-26-115, and then granting summary judgment to Defendants as a result. Before granting summary judgment, the Trial Court had before it the affidavit of Dr. Aamodt and the supplemental affidavit of Dr. Aamodt. Dr. Aamodt's affidavit contains no information that would satisfy the locality rule and his supplemental affidavit makes only the bare assertions that Dr. Aamodt has reviewed statistics about the two relevant communities and that they are similar. These two affidavits contain insufficient facts and evidence to show that the two relevant communities are similar. The Trial Court properly held that based upon the information before it at that time, Plaintiff had failed to satisfy her burden to show that Dr. Aamodt met the requirements of Tenn. Code Ann. § 29-26-115. As Plaintiff's opposition to the motion for summary judgment rested solely on Dr. Aamodt's affidavits, the Trial Court initially properly granted summary judgment to Defendants.

However, we next must consider whether the Trial Court erred in refusing to grant Plaintiff's motion to rehear, which was in essence a motion to alter or amend. *See Harris v. Chern*, 33 S.W.3d 741, 743 (Tenn. 2000) (stating "the Tennessee Rules of Civil Procedure do not authorize motions 'to reconsider' a grant of summary judgment. *See McCracken v. Brentwood United*

Methodist Church, 958 S.W.2d 792, 794 n.3 (Tenn. Ct. App. 1997). Instead, the rules allow for motions 'to alter or amend a judgment,' Tenn. R. Civ. P. 59.04, or motions 'to revise' a non-final partial judgment, *see* Tenn. R. Civ. P. 54.02.").

"We review a trial court's denial of a Tenn. R. Civ. P. 59.04 motion to alter or amend a judgment for abuse of discretion." *Chambliss v. Stohler*, 124 S.W.3d 116, 120 (Tenn. Ct. App. 2003). Our Supreme Court discussed the abuse of discretion standard in *Eldridge v. Eldridge*, stating:

> Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to [the] propriety of the decision made." A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted).

As this Court explained in *Kenyon v. Handal*:

> Trial courts are not required to grant relief from an order granting a summary judgment if the patient remains unable to demonstrate the existence of a material factual dispute requiring a trial. Thus, if a patient files a motion for Tenn. R. Civ. P. 59.04 relief relying on a new affidavit that itself does not satisfy the requirements of Tenn. R. Civ. P. 56.06, Tenn. R. Evid. 104(a), Tenn. R. Evid. 702, or Tenn. Code Ann. § 29-26-115, the trial court may decline to set aside its previous summary judgment order.

Kenyon v. Handal, 122 S.W.3d 743, 765 (Tenn. Ct. App. 2003). "Even though we have repeatedly urged lawyers to couch their medical experts' affidavits in the language of Tenn. Code Ann. § 29-26-115, we do not require rigid adherence to the statute. Rather, we examine the substance of the statements to determine whether they are based on trustworthy facts or data." *Id.* at 759.

In the case now before us, the Trial Court did consider Dr. Aamodt's Second Supplemental Affidavit and still found that Dr. Aamodt was not qualified under Tenn. Code Ann. § 29-26-115. Dr. Aamodt did not practice in Johnson City, Tennessee and was not personally familiar with the standard of care in Johnson City, Tennessee. Given this, in order for Dr. Aamodt to be competent to testify as an expert witness under Tenn. Code Ann. § 29-26-115, Plaintiff had to show that Dr. Aamodt was familiar with the standard of care in a community similar to Johnson City.

We note that while it is common practice for a plaintiff to make a showing of the similarity of communities through testimony of the plaintiff's expert witness, Tenn. Code Ann. § 29-26-115 does not require that this showing be made through the testimony of the expert witness. Rather, Tenn. Code Ann. § 29-26-115 requires, on this issue, only that a plaintiff show that the

plaintiff's expert knows the standard of care in a community that is similar to the community in which the defendant practices. A plaintiff is free to introduce other evidence, including the testimony of other witnesses, in order to make the requisite showing that the two communities are similar. In the case now before us, Plaintiff did attempt to make the requisite showing that the communities are similar solely through the testimony of Dr. Aamodt.

The issue now before us is factually similar to the issue regarding expert witness competency in the *Taylor* case. *Taylor*, 231 S.W.3d at 365-71. In *Taylor*, the expert witness, who was from Georgia, admitted upon questioning by defense counsel during deposition that he had no familiarity with Jackson, Tennessee, where the alleged malpractice occurred. *Id.* at 367-68. The *Taylor* Court noted, however, that the expert "later rehabilitated himself under questioning by counsel for Plaintiff." *Id.* at 368. Specifically, the *Taylor* expert reviewed information and testified about the location of Jackson, the population of Jackson, and details about colleges, universities, and hospitals in Jackson and equated this information with the area in which the expert practiced. *Id.* at 369-70.

The case now before us is also strikingly factually similar to the very recent case of *Nabors v. Adams*, in which summary judgment was granted to the defendants because the plaintiff's expert failed to satisfy the locality rule and plaintiff then attempted to rehabilitate the expert by filing a motion to alter or amend supported by a supplemental affidavit. *Nabors v. Adams*, W2008-02418-COA-R3-CV, 2009 Tenn. App. LEXIS 478 (Tenn. Ct. App. July 23, 2009)[2]. In *Nabors*, this Court found that the supplemental affidavit showed sufficient similarities between Memphis, the place where the alleged malpractice occurred, and Atlanta, where the plaintiff's expert practiced, by showing the population, number of institutions of higher learning, and number of hospitals, along with some details about the hospitals. *Id.* at *14.

In their brief on appeal, Defendants argue that the two relevant communities, Johnson City, Tennessee and Harrisonburg, Virginia are not similar and that "when Dr. Aamodt compared the number of hospital beds at the two hospitals, this only served to show that the Johnson City Medical Center has almost 200 more beds than the hospital where Dr. Aamodt practices." However, the statute does not require the two communities at issue to be identical. Instead, Tenn. Code Ann. § 29-26-115, requires a plaintiff to show only that the two communities are similar. No two communities ever will be exactly the same in all respects, particularly with regard to things that can be counted like hospital beds or the number of people in a given population.

Defendants also list types of facts about Johnson City that Dr. Aamodt did not provide in his affidavit. Defendants then argue: "One has to wonder if this information was strategically not included because it would only prove the disparity between the two communities." While Rule 56.06 of the Tennessee Rules of Civil Procedure placed the burden squarely on Plaintiff to show that Dr. Aamodt was competent to testify, Defendants were free to provide to the Trial Court, in an appropriate manner, additional facts and information showing that the two communities

[2] As of the time of the filing of this Opinion, the time for filing a Rule 11 application to appeal to the Tennessee Supreme Court had not yet expired in *Nabors v. Adams*.

were not similar. While other facts about Johnson City and Harrisonburg may have been helpful and relevant to the analysis, we find that the specific facts and information about Johnson City and Harrisonburg provided by Dr. Aamodt in his Second Supplemental Affidavit are consistent with those provided in *Taylor* and *Nabors* and, as found in those two cases, are sufficient to satisfy Plaintiff's burden of showing that the two relevant communities are similar. Accordingly, we reverse both the Trial Court's denial of Plaintiff's motion to alter or amend and the summary judgment granted to Defendants.[3]

Conclusion

The judgment of the Trial Court is reversed, and this cause is remanded to the Trial Court for further proceedings consistent with this Opinion. The costs on appeal are assessed against the Appellees, Karen K. Lauer-Silva, M.D. and Medical Education Assistance Corporation d/b/a ETSU Physicians & Associates.

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D. MICHAEL SWINEY, JUDGE

[3] We do not hold by this Opinion that the Trial Court was required to consider Dr. Aamodt's Second Supplemental Affidavit in determining whether or not summary judgment was appropriate. A trial court is not required to permit a party to file a series of affidavits attempting to show an expert's familiarity with the locality rule. Here, however, the Trial Court did consider the Second Supplemental Affidavit and made its determination that summary judgment still was appropriate after accepting and considering the Second Supplemental Affidavit.